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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AT PORTLAND

**FIRST SPECIALTY INSURANCE
CORPORATION,**

PLAINTIFF,

v.

**THE CONFEDERATED TRIBES OF THE
GRAND RONDE COMMUNITY OF
OREGON,**

DEFENDANT.

Case No. 07 CV-05

COMPLAINT

**Declaratory Judgment, 28 U.S.C.
§ 2201(a); Injunctive Relief, 28 U.S.C.
§ 2202; and Application to Confirm
Arbitration Award, 9 U.S.C. § 9**

For its Complaint, plaintiff First Specialty Insurance Corporation ("FSIC") alleges
as follows:

NATURE OF ACTION

1.

FSIC seeks declaratory and injunctive relief to prevent the Confederated Tribes of
the Grand Ronde Community of Oregon ("Tribe") from enforcing decisions of the Tribe's courts

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that invalidate an award against the Tribe arising out of an arbitration proceeding that the Tribe commenced. FSIC also seeks entry and enforcement of the arbitration award.

THE PARTIES

2.

FSIC is a corporation duly organized and existing under the laws of Missouri. FSIC is successor by assignment to the interests of Strategic Wealth Management, Inc., a Washington corporation ("SWM"), and Patrick Sizemore ("Sizemore"), SWM's president and majority shareholder, in the arbitration award discussed below. SWM and Sizemore are not members of the Tribe.

3.

The Tribe is a federally recognized Indian tribe organized under the Grand Ronde Restoration Act of November 22, 1983. The Tribe maintains governmental offices in Grand Ronde, Oregon.

BACKGROUND ALLEGATIONS

4.

In 1992, the Tribe and SWM entered into an Investment Advisory Agreement ("Agreement"). The Agreement stated in pertinent part: "All controversies which may arise between [the Tribe] and [SWM] concerning any transaction or the construction, performance or breach of this or any other agreements between them * * * shall be determined by arbitration. * * * Any arbitration shall be in accordance with the rules then applying of the American Arbitration Association, New York Stock Exchange or the National Association of Securities Dealers, at [the Tribe's] election."

5.

In 2001, the Tribe sued SWM and Sizemore in Multnomah County Circuit Court, alleging that, in transactions with the Tribe, SWM and Sizemore had violated the Oregon

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Securities Law, ORS 59.115, a claim that provides for the recovery of attorney fees and costs by the prevailing party.

6.

SWM and Sizemore moved pursuant to the Federal Arbitration Act, 9 U.S.C. § 3, to require the Tribe to pursue its claims in arbitration. The Tribe objected, arguing, among other things, that (1) the arbitration clause was unenforceable because it was drafted by SWM; (2) the Tribe could not be required to arbitrate its claims because the Tribe had not waived its immunity from suit; and (3) the Agreement did not cover the Tribe's claims against SWM and Sizemore.

7.

The Multnomah County Circuit Court rejected the Tribe's arguments, ordering the Tribe's claims into arbitration pursuant to the Agreement and dismissing the action.

8.

In 2003, the Tribe selected the American Arbitration Association ("Association") from among the arbitration organizations listed in the Agreement. The Tribe then submitted its claims, including the Oregon Securities Law claim, for decision by the Association.

9.

The Association's rules provided in pertinent part that:

a. "The award of the arbitrator(s) may include: * * * an award of attorneys' fees if all parties have requested such an award or [the award of attorney fees] is authorized by law or [the parties'] arbitration agreement."

b. "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."

c. "A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection."

10.

All parties requested attorney fees. ORS 59.115(10) authorized an award of attorney fees to the prevailing party on the Tribe's claim under the Oregon Securities Law.

11.

In 2004, the Association's arbitration panel held a 21-day hearing in Seattle, Washington. The Tribe did not object to the arbitrability of SWM and Sizemore's claim for attorney fees or the Association's authority to award fees on the claim until after the hearing on the merits of the Tribe's claims had concluded.

12.

On August 13, 2004, the Association panel in Seattle rejected all of the Tribe's claims against SWM and Sizemore, and awarded attorney fees and costs to SWM and Sizemore in the amount of \$1,431,402, with interest at the rate of 12 percent per year. The panel also awarded SWM and Sizemore an additional \$59,435.63 from the Tribe as reimbursement for a portion of the arbitration fees and expenses. The panel specifically ruled that "[t]he Tribe agreed, as both we and the Multnomah Circuit Court have found, clearly and ambiguously, to arbitrate any disputes with its investment advisor, SWM." The panel also ruled that "[t]he Tribe waived its sovereign immunity by executing the [Agreement] and agreed to arbitrate all disputes regardless of when—and by whom—a claim might be asserted in the arbitration process. The present claim by SWM [for attorney fees] is within the scope of the parties' arbitration clause."

13.

The Tribe petitioned both the Tribal Court of the Confederated Tribes of the Grand Ronde Community of Oregon ("Tribal Court"), in case no. C-04-08-003, and the Multnomah County Circuit Court, in case no. 0408-08837, to vacate the Seattle arbitration panel's award of attorney fees and costs to SWM and Sizemore. Because the Tribal Court proceeding was filed first, on the Tribe's motion, the Multnomah County Circuit Court ordered case no. 0408-08837 stayed pending the resolution of the Tribal Court proceeding.

14.

SWM and Sizemore moved to dismiss the Tribe's petition to vacate the arbitration award in the Tribal Court, asserting, among other things, that both subject matter and personal jurisdiction were lacking. By interlocutory order dated December 20, 2004, the Tribal Court denied the motion. On August 5, 2005, the Tribal Court issued its final Order Vacating Arbitration Award of Fees and Costs. Both orders were timely appealed by SWM and Sizemore to the Court of Appeals for the Confederated Tribes of the Grand Ronde Community of Oregon ("Tribal Court of Appeals").

15.

SWM and Sizemore assigned all right, title, and interest in the arbitration award to FSIC. By order of the Tribal Court of Appeals dated December 20, 2005, FSIC was substituted for SWM and Sizemore in the tribal appellate proceeding.

16.

Before the Tribal Court of Appeals, FSIC argued that the Tribal Court lacked jurisdiction to review and vacate the Seattle arbitration panel's award. FSIC further contended that the Tribal Court was precluded from reviewing the decision necessary to the Multnomah County Circuit Court's order that sent the Tribe's claims to arbitration: that the Agreement waived the Tribe's immunity to a reciprocal claim of attorney fees under the Oregon Securities Law. Finally, FSIC argued that, even if the Tribal Court could review the panel award, the Tribal Court erred in concluding that the panel's decision to award fees and costs was irrational or made in manifest disregard of the law.

17.

A majority of the three-judge panel of the Tribal Court of Appeals rejected FSIC's arguments. The majority ruled that the Tribal Court had the authority to vacate the Seattle arbitration panel's award and that, contrary to the Multnomah County Circuit Court's and arbitration panel's decisions, the Tribe had not waived its immunity to the reciprocal

claim for attorney fees. The majority further ruled that the Tribal Court had both subject matter and personal jurisdiction over SWM and Patrick Sizemore. The Tribal Court of Appeals therefore affirmed the Tribal Court's decision to vacate the arbitration panel's award. It was, however, the dissenting member of the panel who correctly applied the law that applies to the case:

The trial judge found the application of current AAA rules to this controversy "untenable," slip op. at 26, but *C & L Enterprises* makes it clear that those rules do apply. The majority of this court reasons, in a circular way, that the parties' agreement incorporating the AAA rule on attorney fees cannot authorize an award of attorney fees allowed by law because the Tribe did not agree to arbitrate the issue of attorney fees. Whatever may be the merits of that position, it avoids the question placed before us for decision. Did the arbitrators act irrationally or in manifest disregard for the law by concluding otherwise? I cannot say that they did.

JURISDICTION AND VENUE

18.

Because the extent of an Indian tribe's jurisdiction over nonmembers and whether a tribe has waived its immunity to suit are federal questions, this Court has jurisdiction of this action under 28 U.S.C. § 1331. This Court may issue an injunction under 28 U.S.C. § 2202, and may grant declaratory and further relief under 28 U.S.C. § 2201. Pursuant to 9 U.S.C. § 9, this Court may enter an order confirming the arbitration award.

19.

Venue is proper in this district under 28 U.S.C. § 1391(b).

FIRST CLAIM FOR RELIEF

(Declaratory Judgment, 28 U.S.C. § 2201(a))

20.

FSIC incorporates by reference all preceding paragraphs.

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21.

The Tribal Court and Tribal Court of Appeals lacked jurisdiction to review and vacate the arbitration award and erred by deciding that the Tribe had not waived its immunity to the award of fees and costs under ORS 59.115.

22.

Pursuant to 28 U.S.C. § 2201, FSIC is entitled to a judicial declaration that (1) the decision of the Tribal Court of Appeals dated October 31, 2006, is void and without legal effect; and (2) the arbitration award dated August 13, 2004, is valid and enforceable.

23.

Pursuant to ORS 59.115(10) and the rules of the Association, FSIC is entitled to recover from the Tribe the attorney fees and costs that FSIC has incurred in the Tribal Court, the Tribal Court of Appeals, and this Court.

SECOND CLAIM FOR RELIEF

(Injunctive Relief, 28 U.S.C. § 2202)

24.

FSIC incorporates by reference all preceding paragraphs.

25.

FSIC is entitled to an injunction prohibiting the Tribe from enforcing the decision of the Tribal Court of Appeals dated October 31, 2006, and the Order Vacating Arbitration Award of Fees and Costs of the Tribal Court dated August 5, 2005.

THIRD CLAIM FOR RELIEF

(Application to Confirm Arbitration Award, 9 U.S.C. § 9)

26.

FSIC incorporates by reference all preceding paragraphs.

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27.

The Agreement provides: "The award of arbitrators or of the majority of them, shall be final and judgment upon the reward rendered may be entered into any court, State of Federal, having jurisdiction."

28.

The arbitration award dated August 13, 2004, was made pursuant to the arbitration provision of the Agreement.

29.

FSIC is entitled to an order confirming the arbitration award dated August 13, 2004, and entering judgment in favor of FSIC for the amount of that award.

PRAYER FOR RELIEF

WHEREFORE, plaintiff FSIC prays for judgment as follows:

1. For a declaratory judgment that the decision of the Tribal Court of Appeals dated October 31, 2006, is void and without legal effect, and that the arbitration award dated August 13, 2004, is valid and enforceable;

2. For an injunction prohibiting the Tribe from enforcing the decision of the Tribal Court of Appeals dated October 31, 2006, and the Order Vacating Arbitration Award of Fees and Costs of the Tribal Court dated August 5, 2005;

3. For an order confirming the arbitration award dated August 13, 2004, and entering judgment for FSIC and against the Tribe in the amount of \$1,431,402, plus \$59,435.63 in arbitration fees and expenses, plus accrued interest on both amounts at a rate of 12% per year from September 13, 2004, until judgment is paid;

4. For the attorney fees and costs that FSIC has incurred in the Tribal Court, the Tribal Court of Appeals, and in this Court; and

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5. For such other relief as the Court deems just and proper.

DATED this 3rd day of January, 2007.

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